No. 2529.

In the

United States Circuit Court of Appeals

For the Ninth Circuit.

R. C. WOOD, JOHN L. McGINN and JOHN A. JESSON, - - - - - - - - - - - - - - *Appellants,*

VERSUS

F. G. NOYES, as Receiver of the WASHINGTON-ALASKA BANK, a Corporation, - - *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

BRIEF OF APPELLEE.

O. L. RIDER,
Attorney for Appellee.

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BRIEF *of* APPELLEE.

This was an action brought by the receiver of an insolvent bank to recover from stockholders a dividend which had been paid to and received by them out of the capital of the bank and not out of the surplus or undivided profits. Judgment was rendered in fa-

vor of all of the defendants who were not officers or directors of the bank. The three defendants involved in this appeal, Messrs. Wood, McGinn and Jesson, was each a director at the time the dividend was declared. As to them the court found that they knew that the dividend was not declared out of any surplus or undivided profits, or that by exercise of reasonable diligence they could so have known. This finding is squarely made by the court on conflicting testimony, and by it the defendants are bound on appeal.

The case of *McDonald* v. *Williams*, 174 U. S. 397, cited by counsel in their brief, has no application to such finding. It was a case where recovery against the stockholders receiving a dividend declared during insolvency was not allowed, because the proof failed to show that such stockholders had knowledge of the insolvency of the bank at the time the dividend was declared.

The only other point urged by counsel as a basis for reversal is that the facts stated in the complaint are insufficient to support the judgment, for the reason that there is no allegation in the complaint that the defendants received the dividend with knowledge that the capital of the bank had been impaired or that it was paid in violation of the laws of Nevada. No objection was made to the complaint in the lower court. No demurrer was filed questioning the sufficiency of the facts stated. If the omission to charge such knowledge in the complaint is a defect, and it is not conceded that it is, the same has been waived by

these defendants. In their answer the defendants allege that at the time they received the dividend they believed the bank to be solvent and that they received the dividend in good faith, believing that it came out of the profits of said bank and not otherwise. Reply was filed, denying this allegation of the answer. These pleadings, subsequent to the complaint, put in issue the good faith of the defendants in receiving the dividends and their claim of want of knowledge that the dividend was not paid out of the profits of the bank. Such subsequent pleadings cure the alleged defect in the complaint.

—*Catlin* v. *Jones*, (Or.) 85 Pac. 515.

The defendant, Wood, claimed that he was not liable for the return of the dividend because the stock on which the same was declared and paid to him did not belong to Wood but to another party. The proof showed, however, that even though this stock did not belong to Wood, he turned the dividend over to said other party and never returned it to the bank, and that he did so, knowing that the dividend was not paid out of any surplus or undivided profits. Under the decision in *Finn* v. *Brown*, 142 U. S. 56, 35 L. ed. 936, Wood is liable to the receiver for this dividend, even under the above alleged state of facts. In that case it was held,

> "Where a person receives from a bank a dividend on stock which he denies owning, he should restore the dividend to the bank; he does not free himself from liability for it by giving his check

> on the bank for the sum to the alleged true owner."

The matter of the insolvency of the bank at the time the dividend was declared has been fully considered in the brief of appellee filed in this court in the companion case of *Jesson* v. *Noyes*, No. 2528, being an action against the directors for unlawfully declaring and paying this particular dividend. To that brief, reference is respectfully made on all of the other questions involved in this appeal.

Speaking of the case of *Jesson* v. *Noyes*, *supra*, insofar as it involves the declaration and payment of the dividend, counsel say in their brief, page 32, as follows:

> " The curious result is that the directors are ordered to pay to the receiver in one action the amount of a dividend paid to themselves as stockholders, and in the other action brought against them as stockholders, they are again ordered to pay the same amount to the receiver."

In said *Jesson* v. *Noyes*, judgment for the entire dividend was rendered against appellants, jointly and severally, in the sum of $33,720.00, for their misconduct as directors of the bank in declaring and paying the same when there was neither surplus nor undivided profits. This was a joint and several judgment on the tort. In this action they are being proceeded against as stockholders to recover that portion of the dividend which was paid to and received by

them. As such stockholder, each is liable for the return of what he received. No doubt, upon such return, these appellants would be entitled to a credit on their joint and several liability, above referred to, or upon satisfaction of the judgment recovered against them as directors, these individual judgments as stockholders would be extinguished.

It is respectfully submitted that in this action the judgment of the lower court should be affirmed.

O. L. RIDER,
Attorney for Appellee.